Supreme Court, U.S.
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In The
Supreme Court of the United States

COUNTY OF RIVERSIDE,

Petitioner,

v.

TRACY L. WATSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a civil rights case, plaintiff obtained a preliminary injunction against a county until the merits of the case could be decided. In a published opinion, the district court issued the preliminary injunction based on a mere "balance of hardships," *not* on the merits of the case. Later, the defendants obtained summary judgment on 18 out of 19 of plaintiff's claims, and in favor of five out of six of the defendants. On that remaining claim, against that one defendant, the district court found triable issues. Rather than trying the claim on the merits, plaintiff dismissed his case. Thereafter, the district court deemed plaintiff to be the "prevailing party" under 42 U.S.C. § 1988 and awarded to plaintiff $153,988.41 in attorney's fees and costs for work completed over the entire life of the case. In a published opinion that directly conflicts with the holding of every other circuit court in the country, the Ninth Circuit affirmed. The questions presented are:

1. Did the Ninth Circuit err when it held that a plaintiff who obtains a preliminary injunction, not on the merits, and loses everything else, is a "prevailing party" under 42 U.S.C. § 1988?

2. Did the Ninth Circuit err when it held that a preliminary injunction, not on the merits, carries all the "judicial imprimatur" necessary to satisfy this Court's holding last year in *Buckhannon v. West Virginia*?

PARTIES

The only parties to this petition are petitioner County of Riverside and respondent Tracy Watson.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Opinions Below	1
Basis for Jurisdiction	1
Relevant Statute	1
Statement of the Case	2
A. Statement of Facts	2
B. Federal Jurisdiction and Plaintiff's Theories of Liability	2
C. The Preliminary Injunction Was *Not* Issued on the Merits	3
D. The County *Voluntarily* Decided Not to Use the Report	4
E. Summary Judgment Was Granted, *on the Merits*, on 18 out of 19 Separate Claims, in Favor of Five out of Six Defendants	4
F. Plaintiff Lost His Case	7
G. Motion for Attorney's Fees	7
H. Ninth Circuit Opinion	8
Argument	9
A. Summary of Argument	9
B. Plaintiff Never Prevailed on the Merits on Anything	10
C. The Ninth Circuit's Decision Conflicts with Several Decisions of this Court	11

TABLE OF CONTENTS – Continued

Page

D. The Ninth Circuit's Decision Conflicts with Decisions of Every Other Circuit 15

E. The Ninth Circuit's Decision Conflicts with the Policies Behind 42 U.S.C. § 1988 19

Conclusion 21

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alioto v. Williams, 450 U.S. 1012 (1981) 11

Bisciglia v. Kenosha Unified School District, 45 F.3d 223 (7th Cir. 1995) 18

Brickwood Construction, Inc. v. United States, 288 F.3d 1371 (Fed. Cir. 2002) 19

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001) 11, 12, 13, 14, 20

Cantrell v. International Brotherhood of Electrical Workers, 69 F.3d 456 (10th Cir. 1995) 10

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 19

Dahlem v. Board of Education, 901 F.2d 1508 (10th Cir. 1990) 18

Doe v. Williams, 451 U.S. 993 (1981) 11

Farrar v. Hobby, 506 U.S. 103 (1992) 14

Foreman v. Dallas County, 193 F.3d 314 (5th Cir. 1999), *cert. den.* 529 U.S. 1067 (2000) 17

Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978) 3

Gosnell v. Rentokil, Inc., 175 F.R.D. 508 (N.D. Ill. 1997) 11

Haley v. Pataki, 106 F.3d 478 (2nd Cir. 1997) 16

Hanrahan v. Hampton, 446 U.S. 754 (1980) 13, 14

Hewitt v. Helms, 482 U.S. 755 (1987) 13, 14

TABLE OF AUTHORITIES – Continued

Page

Hudson v. Reno, 130 F.3d 1193 (6th Cir. 1997), *cert. den.* 525 U.S. 822 (1998) 18

J. O. v. Orange Township Board of Education, 287 F.3d 267 (3rd Cir. 2002) 17

Kay v. David Douglas School District, 484 U.S. 1032 (1988) 11

Kentucky v. Graham, 473 U.S. 159 (1985) 13

Larouche v. Kezer, 20 F.3d 68 (2nd Cir. 1994) 16

Latrieste Restaurant v. Village of Port Chester, 188 F.3d 65 (2nd Cir. 1999) 16

Laurenzo v. Mississippi High School, 708 F.2d 1038 (5th Cir. 1983) 17

Libby v. Illinois High School Association, 921 F.2d 96 (7th Cir. 1990) 18

Markham v. International Association of Bridge, Structural and Ornamental Iron Workers, 901 F.2d 1022 (11th Cir. 1990) 19

Paragould Music Company, Inc. v. City of Paragould, 738 F.2d 973 (8th Cir. 1984) 18

Pollard v. E. I. Du Pont de Nemours & Co., 532 U.S. 843 (2001) 18

Race v. Toledo-Davila, 291 F.3d 857 (1st Cir. 2002) 16

Rhodes v. Stewart, 488 U.S. 1 (1988) 14

Royal Crown Cola Co. v. Coca-Cola Co., 887 F.2d 1480 (11th Cir. 1989), *cert. den.* 497 U.S. 1011 (1990) 19

Sequa Corp. v. Cooper, 245 F.3d 1036 (8th Cir. 2001) 11

TABLE OF AUTHORITIES – Continued

Page

Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002), *cert. den.* ___ U.S. ___, 123 S.Ct. 112 (2002).....17

Sullivan v. Hudson, 490 U.S. 877 (1989).....14

Warner v. Independent School District, 134 F.3d 1333 (8th Cir. 1998), *cert. den.* 525 U.S. 823 (1998).....18

Watson v. County of Riverside, 300 F.3d 1092 (9th Cir. 2002).....1

Watson v. County of Riverside, 976 F.Supp. 951 (C.D. Cal. 1997).....1, 3

Webster v. Sowders, 846 F.2d 1032 (6th Cir. 1988).....18

Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980), *cert. den.* 450 U.S. 1012 (1981).....15

FEDERAL STATUTES

28 U.S.C. § 1254.....1

42 U.S.C. § 1983.....1

42 U.S.C. § 1988.....1, 10, 19

STATE STATUTES

California Government Code § 3303.....5

OPINIONS BELOW

The district court opinion granting the preliminary injunction is *Watson v. County of Riverside*, 976 F.Supp. 951 (C.D. Cal. 1997). The district court opinion granting attorney's fees is unpublished. The Ninth Circuit's opinion affirming attorney's fees is *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002), rehearing en banc denied.

BASIS FOR JURISDICTION

The Ninth Circuit panel opinion was entered on August 20, 2002. The order denying a petition for rehearing en banc was entered on October 9, 2002.

Review by certiorari is sought pursuant to 28 U.S.C. § 1254.

RELEVANT STATUTE

The relevant statute is 42 U.S.C. § 1988(b), which provides, in pertinent part, that in any action to enforce a provision of 42 U.S.C. § 1983 "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . . " (The entire statute is reproduced in the appendix.)

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Plaintiff was a deputy sheriff who was caught on a news videotape beating a suspect with his baton. The videotape was broadcast on national television. When he returned to the station, his superiors directed him to write a report regarding the arrest. He asked to see an attorney but was directed to write his report first. He was allowed to see his attorney before he submitted his report. Thereafter, his employment was terminated. Plaintiff appealed the termination.

B. FEDERAL JURISDICTION AND PLAINTIFF'S THEORIES OF LIABILITY

In addition to his administrative appeal, plaintiff also filed suit in the Central District of California against the County of Riverside, the sheriff, and four deputies. In his complaint (and in his motion for a preliminary injunction), plaintiff falsely alleged that he was placed under guard in a locked room and that he was not allowed to see his attorney or his union president until after he submitted his allegedly self-incriminating report. Plaintiff also alleged the report was being published to criminal prosecutors and would be used against him in his administrative appeal. Plaintiff claimed violation of his federal civil rights under the First, Fourth, Fifth and Fourteenth Amendments to the federal constitution, and violation of various California statutes. Plaintiff prayed for money damages, to enjoin public disclosure of the report, and to enjoin use of the report in the administrative appeal.

C. THE PRELIMINARY INJUNCTION WAS *NOT* ISSUED ON THE MERITS

In a published opinion based upon these allegations, the district court found plaintiff had raised "serious questions" of whether he had been deprived of his due process right to legal counsel in face of possible *criminal prosecution*. *Watson v. County of Riverside*, 976 F.Supp. 951, 956, fn. 4 (C.D. Cal. 1997) (*citing Gabrilowitz v. Newman*, 582 F.2d 100, 104 (1st Cir. 1978) ("[I]t is the possibility of subsequent criminal prosecution that triggers the right to counsel in order to ensure due process.")). The court enjoined use of the report not only in "plaintiff's administrative appeal" but also "in any other official proceeding arising therefrom" until the matter could be heard on the merits. *Watson*, 976 F.Supp. at 957. The district court expressly did *not* address the merits of the case, stating that the "findings and conclusions are not binding adjudications, and the court may come to opposite conclusions *at the trial on the merits*." *Watson*, 976 F.Supp. at 957, fn. 3 (italics added).

Thus, the preliminary injunction was *not* issued based on a "strong likelihood of success on the merits," nor even on a "probable success on the merits." Rather, based on a mere "fair chance of success on the merits," the district court concluded that because plaintiff faced threatened criminal prosecution, "the balance of hardships tips sharply" in his favor. *Watson*, 976 F.Supp. at 957. The preliminary injunction was *not* issued on the merits of the facts or the law.

D. THE COUNTY *VOLUNTARILY* DECIDED NOT TO USE THE REPORT

Two weeks *before* the district court issued its opinion granting plaintiff's motion for a preliminary injunction, the County filed its motion for summary judgment. On the same day the preliminary injunction was issued, the County filed a notice of appeal. The County eventually abandoned its appeal of the preliminary injunction.

Rather than waiting for the appeal to be heard in the Ninth Circuit, or waiting for the *merits* of the injunction to be decided in the district court, the County *voluntarily* decided to proceed with the administrative hearing, without using the arrest report, and dismissed the appeal. The preliminary injunction motion had been pending in the district court for five months, and as it turned out, the summary judgement motion sat undecided for one and a half years. Plaintiff's employment termination was affirmed at his administrative appeal, without the report.

E. SUMMARY JUDGMENT WAS GRANTED, *ON THE MERITS*, ON 18 OUT OF 19 SEPARATE CLAIMS, IN FAVOR OF FIVE OUT OF SIX DEFENDANTS

Plaintiff's three count complaint alleged 19 separate claims against six separate defendants. In response to the defendants' motion, the district court granted summary judgment in favor of five out of six defendants, *on the merits*, on all but one of the 19 claims. The district court addressed the merits of each of plaintiff's 19 distinct claims as follows:

Disposition of all claims under Count I:

As to the federal law claims against each of the five individual defendants for *money damages*:

- 1st Amendment, all officers, **qualified immunity**.
- 4th Amendment, all officers, **qualified immunity**.
- 5th Amendment, all officers, **qualified immunity**.
- 14th Amendment, all officers, **qualified immunity**.

As to the federal law claims against the County defendant for *money damages*:

- Unlawful policy, custom or practice, **no evidence**.
- Failure to train, **no evidence**.
- Unconstitutional act of policymaker, **no evidence**.

As to federal law claims against all defendants for *injunctive relief*:

- 1st Amendment, **abandoned** by plaintiff.
- 4th Amendment, **abandoned** by plaintiff
- 5th Amendment, **defendants prevailed** on the evidence.
- 14th Amendment, **triable issue**, procedural due process. (Triable issue as to the County only.)

Disposition of all claims under Count II:

As to the state law claims under Government Code § 3303a, g, h, and i, against all defendants for *injunctive relief*:

- Section 3303a, **defendants prevailed** on the evidence.
- Section 3303g, **defendants prevailed** on the evidence.
- Section 3303h, **defendants prevailed** on the evidence.
- Section 3303i, **defendants prevailed** on the evidence.

Disposition of all claims under Count III:

As to the state constitutional claims under California Constitution, Article I, §§ 1-3, 7, and 13, against all defendants for *damages, injunctive and declaratory relief*:

- Representation by counsel, **abandoned by plaintiff**.
- Free association, **abandoned by plaintiff**.
- Privacy, **abandoned by plaintiff**.
- Unreasonable seizure of person, **abandoned by plaintiff**.

Summary of legal ground for triable issue:

On the one remaining claim, the district court merely found factual issues that needed to be tried, *on the merits*. Interestingly, however, the legal basis the district court used to evaluate the remaining claim was different than the legal basis upon which the district court issued the preliminary injunction. The district court issued a preliminary injunction because the *alleged* threat of criminal prosecution triggered plaintiff's due process right to legal counsel. However, in denying summary judgment on the remaining claim, the district court found triable issues regarding the adequacy of the procedural protections balanced against the risk of an erroneous deprivation of plaintiff's constitutionally protected property interest in his job.

F. PLAINTIFF LOST HIS CASE

After losing his administrative appeal and most of the motion for summary judgment, plaintiff conceded his case was lost and agreed to dismiss the federal action before judgment was entered against him. Because the County had *voluntarily* chosen not to use the report in plaintiff's administrative appeal, rather than waiting for the *merits* of the permanent injunction to be decided, plaintiff's "constitutionally protected property interest in his job" no longer existed. In short, part of the need for a permanent injunction was moot because plaintiff lost his case. Plaintiff voluntarily abandoned any attempt to prevent use of his report in criminal proceedings.

G. MOTION FOR ATTORNEY'S FEES

In its minute order, the district court properly recognized that the sole reason plaintiff filed his case was to seek "a court decision that the arrest report was obtained in violation of his First, Fourth, Fifth, and/or Fourteenth Amendment rights" and/or in violation of his state law rights. The district court also properly recognized plaintiff had lost *everything*, except his motion for a preliminary injunction. Nevertheless, the district court found plaintiff to be the "prevailing party" because plaintiff obtained "some of the benefit [he] sought in bringing the suit" by obtaining the preliminary injunction. Of course, plaintiff never did obtain a "court decision" that his civil rights were violated, on the merits, or otherwise.

After deciding plaintiff was a prevailing party, the district court awarded $153,988.41 in attorney's fees and costs. Other than the fees for opposing a motion to intervene filed by a third party, the district court awarded all

fees and costs incurred by plaintiff over the entire life of the case.

H. NINTH CIRCUIT OPINION

Although the district court found that the purpose of the lawsuit was to obtain a "court decision" that the arrest report was obtained in violation of plaintiff's civil rights, the Ninth Circuit redefined that purpose:

> Having succeeded in winning a preliminary injunction that prevented the use of his report at the administrative hearing, Watson obtained significant, court-ordered relief that accomplished one of the main purposes of his lawsuit. This is so even though he failed to prevail on his other claims. *Watson*, 300 F.3d at 1096.

After redefining the stated purpose of the lawsuit, the Ninth Circuit held that a preliminary injunction not based on the merits was sufficient, by itself, to confer prevailing party status, regardless of the outcome of any of the remaining claims, *as long as the claim upon which the preliminary injunction was based was never litigated to conclusion, on the merits.*

> We recognize that there will be occasions when the plaintiff scores an early victory by securing a preliminary injunction, then loses *on the merits* as the case plays out and judgment is entered against him – a case of winning a battle but losing the war. The plaintiff would not be a prevailing party in that circumstance. But this case is different because Watson's claim for permanent injunctive relief was not decided on the merits. The preliminary injunction was not dissolved for lack of entitlement. Rather, Watson's

> claim for permanent injunction was rendered moot when his employment termination hearing was over, after the preliminary injunction had done its job. *Watson*, 300 F.3d at 1096 (italics added).

On this erroneous basis, the Ninth Circuit affirmed the district court.

ARGUMENT

A. SUMMARY OF ARGUMENT

Although this issue has never been decided by this Court, every other Circuit Court in the country has squarely held that merely obtaining a preliminary injunction, not issued on the merits, is insufficient to confer prevailing party status. Furthermore, this Court repeatedly has held that to obtain prevailing party status, there must be court-ordered relief, *on the merits*. Just last year, this Court held that a voluntary change in position by a defendant, without court-ordered relief on the merits, is insufficient to confer prevailing party status, thus rejecting the "catalyst theory."

The plaintiff did not prevail on the merits on anything. Rather, the defendants prevailed on the merits on everything, except on one small portion of the case that was yet to be tried, on the merits. Moreover, although that one claim became moot, this was because plaintiff's property interest in his job no longer existed. Plaintiff had lost his case.

B. PLAINTIFF NEVER PREVAILED ON THE MERITS ON ANYTHING

Under 42 U.S.C. § 1988, attorney's fees are awarded to a "prevailing party." In this case, the Ninth Circuit held in its published opinion that a plaintiff who obtains a preliminary injunction, *not* based on the merits, but rather, based on a "balance of hardships," and yet loses everything else, is deemed a "prevailing party" under 42 U.S.C. § 1988. However, plaintiff never prevailed on anything in this case, either on the merits, or by way of settlement, or at all.

The district court granted summary judgment on all but one cause of action. As a matter of law, plaintiff was never the "prevailing party" on the merits of any of those claims. Likewise, on the one remaining claim to be tried *on the merits*, where the district court had earlier granted a preliminary injunction, it was granted based on a "balance of hardships," *not* on the merits. In fact, the preliminary injunction was issued based on factual assumptions the district court itself later found to be indisputably false when it granted summary judgment. Moreover, plaintiff was not the "prevailing party" on the merits of the remaining claim, because that claim had not been tried *on the merits*. Finally, rather than actually trying the merits of the single remaining claim, plaintiff voluntarily dismissed his case, even though the threat of criminal prosecution remained, which was the basis for issuing the preliminary injunction. A voluntary dismissal does not make plaintiff a prevailing party under 42 U.S.C. § 1988. In fact, some circuits hold that a voluntary dismissal by a plaintiff actually makes the *defendant* the prevailing party, under Rule 54. *Cantrell v. International Brotherhood of Electrical Workers*, 69 F.3d 456 (10th Cir. 1995) ("a defendant is a

prevailing party under Rule 54 when, in circumstances not involving settlement, the plaintiff dismisses its case against the defendant, whether the dismissal is with or without prejudice"); *Gosnell v. Rentokil, Inc.*, 175 F.R.D. 508, 510 (N.D. Ill. 1997) ("a party . . . whose opponent voluntarily abandoned her claim in the face of a pending motion for summary judgment, must be considered a 'prevailing party'"). Regardless if plaintiff's voluntary dismissal made the County the prevailing party, surely *plaintiff* was never the prevailing party. *Sequa Corp. v. Cooper*, 245 F.3d 1036, 1037-38 (8th Cir. 2001) ("voluntary dismissal without prejudice means that neither party can be said to have prevailed"). Plaintiff never prevailed on the merits on anything, or at all.

C. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH SEVERAL DECISIONS OF THIS COURT

This Court has never addressed whether merely obtaining a preliminary injunction confers prevailing party status. See, *Alioto v. Williams*, 450 U.S. 1012 (1981) (Justices Rhenquist and White dissenting from denial of certiorari); *Doe v. Williams*, 451 U.S. 993 (1981) (Justices Berger, White and Rhenquist dissenting from denial of certiorari); and *Kay v. David Douglas School Dist.*, 484 U.S. 1032 (1988) (Justice White dissenting from denial of certiorari). However, the rationale of several decisions of this Court clearly requires a plaintiff to prevail *on the merits* to be deemed a prevailing party.

Just last term, in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), this Court addressed when

a plaintiff qualifies as a "prevailing party" for purposes of attorney's fees. The specific question this Court addressed was whether a plaintiff can prevail by acting as a "catalyst" to a voluntary change by the defendant. This Court said "no," overruling cases from several circuits, including the Ninth Circuit, based on that theory. One reason for this Court's decision in *Buckhannon* was that filing a nonfrivolous case is simply not the same thing as prevailing on the merits.

> . . . We have only awarded attorney's fees where the plaintiff has received a judgment on the merits, or obtained a court-ordered consent decree – we have not awarded attorney's fees where the plaintiff has secured the reversal of a directed verdict, or acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by "*judicial* relief." Never have we awarded attorney's fees for a nonjudicial "alteration of actual circumstances." While urging an expansion of our precedents on this front, the dissenters would simultaneously abrogate the "merit" requirement of our prior cases and award attorney's fees where the plaintiff's claim "was at least colorable" and "not . . . groundless." We cannot agree that the term "prevailing party" authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the "sought-after destination" without obtaining any judicial relief. 532 U.S. at 604-606, 121 S.Ct. at 1840-1841, emphasis in original, citations omitted.

Here, the County voluntarily decided to proceed with the hearing of plaintiff's administrative appeal rather than waiting until the *merits* of the injunction could be

heard. Certainly, the County could have waited for the appeal on the preliminary injunction to be heard and/or waited until the merits of the injunction were tried in the district court. Instead, the County voluntarily decided to proceed without the report, and still prevailed anyway.

Additionally, several of the cases cited in *Buckhannon* expressly hold that a non-final decision, which does not decide the merits of any issue, does not confer prevailing party status. In *Hanrahan v. Hampton*, 446 U.S. 754 (1980), this Court held that attorney's fees cannot be awarded pendente lite for reversing a defense judgment on appeal, but only when a party has prevailed on the merits.

> It seems apparent from these passages that Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims. For only in that event has there been a determination of the "substantial rights of the parties," which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney. 446 U.S. at 757-758.

In *Hewitt v. Helms*, 482 U.S. 755, 760 (1987), this Court held that "respect for ordinary language requires that a plaintiff receive at least some relief *on the merits* of his claim before he can be said to prevail." (Emphasis added). In *Kentucky v. Graham*, 473 U.S. 159, 165 (1985), this Court held that if the defendant is immune from liability, it is not subject to an award of attorney's fees, because "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that

defendant." In *Sullivan v. Hudson*, 490 U.S. 877, 876-877 (1989), this Court held that an order remanding a case for further social security review does not confer prevailing party status unless the remand dictates an award of benefits.

In *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992), this Court held that "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim." Cf. *Rhodes v. Stewart*, 488 U.S. 1 (1988) (if the case was moot at the time judgment was entered in the plaintiff's favor, the plaintiff is not a prevailing party).

In short, this Court has consistently held that a plaintiff does not become a prevailing party merely by obtaining a ruling that the case is not frivolous, nor by obtaining a procedural victory not based on the merits. Yet, this is precisely the published holding of the Ninth Circuit.

Moreover, in its published opinion, the district court expressly did *not* decide any legal issues in plaintiff's favor; rather, it rejected most of plaintiff's theories and found only a "fair chance" of success on a single theory, if and when that issue was decided on the merits. The preliminary injunction was issued based on a mere "balancing of hardships," not on a decision on the merits. Thus the district court's order was nothing more than a determination that plaintiff's case was not frivolous or groundless, *if* plaintiff's allegations are believed and all factual disputes are resolved in plaintiff's favor. This is precisely what *Buckhannon*, *Hanrahan* and *Hewitt* held was insufficient to confer prevailing party status. Yet, the Ninth Circuit held in this case that merely issuing a preliminary

injunction, regardless of the actual merits, is sufficient to confer prevailing party status. While the Ninth Circuit recognized the requirement of a court order to confer prevailing party status, it completely ignored the additional requirement that the order must be based on the merits.

> A preliminary injunction issued by a judge carries all the "judicial imprimatur" necessary to satisfy *Buckhannon*. In this case, the County was prohibited from introducing Watson's report at the termination hearing for one reason and for one reason only: because Judge Timlin said so. Under *Williams*[1], Watson was a prevailing party. And under *Buckhannon*, he was not a mere catalyst of an extra-judicial voluntary change in conduct. There was nothing voluntary about the County's inability to use the report. 300 F.3d at 1096.

The Ninth Circuit's opinion conflicts with this Court's repeated holdings that a plaintiff does not prevail merely by filing a non-frivolous case, but only if there is either a decision on the merits or a court-enforceable settlement.

D. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF EVERY OTHER CIRCUIT

The Ninth Circuit's opinion directly conflicts with every other circuit which has considered this issue. Other than the Ninth Circuit, *every* circuit holds that a plaintiff is not a prevailing party unless and until that party has

[1] *Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980), *cert. den.* 450 U.S. 1012 (1981).

obtained either a court-enforceable settlement or a favorable decision on the merits. Some of the circuits hold that even a preliminary injunction based on the merits is insufficient unless it is followed by a judgment on the merits. All other circuits reject the Ninth Circuit's analysis. The other circuits hold:

First Circuit The plaintiff must obtain relief on the merits in order to qualify as a prevailing party. *Race v. Toledo-Davila*, 291 F.3d 857, 858-859 (1st Cir. 2002) ("Contrary to appellant's suggestion, one does not qualify as a 'prevailing party' simply by obtaining a change in the status quo. Rather, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties. . . . In sum, an individual may be entitled to attorney's fees without having obtained a favorable final judgment following a full trial on the merits, but he must obtain relief based on the merits of at least some of his claims.") (Citations and internal quotations omitted)

Second Circuit A plaintiff prevails only if the preliminary injunction was based on the merits. *Haley v. Pataki*, 106 F.3d 478, 483 (2nd Cir. 1997) ("When a party receives a stay or preliminary injunction but never obtains a final judgment, attorney's fees are proper if the court's action in granting the preliminary injunction is governed by its assessment of the merits. [Citation] Fees are not warranted, however, if the court has not based its decision to award interim relief on the merits."); *Latrieste Restaurant v. Village of Port Chester*, 188 F.3d 65 (2nd Cir. 1999) (agreement to extend a temporary restraining order, which was not based on the merits, is not a basis for fees); *Larouche v. Kezer*, 20 F.3d 68 (2nd Cir. 1994) (injunction

issued pending appeal is not a basis for fees unless it is a determination on the merits).

Third Circuit A preliminary injunction confers prevailing party status only if it was based on the merits. *J. O. v. Orange Township Board of Education*, 287 F.3d 267, 273-274 (3rd Cir. 2002) (preliminary injunction is not a basis for fees unless it is based on the merits).

Fourth Circuit Even a preliminary injunction on the merits is insufficient to confer prevailing party status unless it is followed by a judgment on the merits. *Smyth v. Rivero*, 282 F.3d 268, 276-277 (4th Cir. 2002), *cert. den.* ___ U.S. ___, 123 S.Ct. 112 (2002) ("A preliminary injunction such as that granted to Smyth and Montgomery below is closely analogous, for these purposes, to the examples of judicial relief deemed insufficient in *Buckhannon*. . . . The fact that a preliminary injunction is granted in a given circumstance, then, by no means represents a determination that the claim in question will or ought to succeed ultimately; that determination is to be made upon the 'deliberate investigation' that follows the granting of the preliminary injunction.")

Fifth Circuit A preliminary injunction does not confer prevailing party status unless it was based on the merits. *Foreman v. Dallas County*, 193 F.3d 314, 323 (5th Cir. 1999), *cert. den.* 529 U.S. 1067 (2000) (a TRO is not based on the merits and thus is not a basis for fees); *Laurenzo v. Mississippi High School*, 708 F.2d 1038, 1041, 1043 (5th Cir. 1983) (injunction issued pending appeal was not a basis for fees because it was not a determination on the merits).

Sixth Circuit A preliminary injunction is a basis for prevailing party status only if it was based on the merits.

Webster v. Sowders, 846 F.2d 1032 (6th Cir. 1988) (fees denied because the preliminary injunction was not on the merits); *Hudson v. Reno*, 130 F.3d 1193, 1207 (6th Cir. 1997), *cert. den.* 525 U.S. 822 (1998) (following *Webster*).[2]

Seventh Circuit A preliminary injunction is a basis for prevailing party status only if it was a determination on the merits. *Libby v. Illinois High School Association*, 921 F.2d 96, 99 (7th Cir. 1990) ("A plaintiff who obtains provisional relief, such as a TRO, becomes a prevailing party only if that relief was a determination on the merits or acted as a catalyst to obtain concessions from the appellee."); *Bisciglia v. Kenosha Unified School District*, 45 F.3d 223 (7th Cir. 1995) (fees denied because the preliminary injunction was not on the merits).

Eighth Circuit A preliminary injunction is a basis for fees only if it was based on the merits. *Paragould Music Company, Inc. v. City of Paragould*, 738 F.2d 973 (8th Cir. 1984) (attorney's fees denied because the preliminary injunction was not on the merits); *Warner v. Independent School District*, 134 F.3d 1333, 1336 (8th Cir. 1998), *cert. den.* 525 U.S. 823 (1998).

Tenth Circuit A plaintiff who obtains a preliminary injunction prevails only if it was based on the merits. *Dahlem v. Board of Education*, 901 F.2d 1508 (10th Cir. 1990) (attorney's fees are available only if the decision is on the merits).

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[2] *Hudson* was overruled in part, on the unrelated issue of proper remedies for employment discrimination, in *Pollard v. E. I. Du Pont de Nemours & Co.*, 532 U.S. 843 (2001).

Eleventh Circuit A plaintiff who obtains a preliminary injunction not based on the merits is not a prevailing party. *Royal Crown Cola Co. v. Coca-Cola Co.*, 887 F.2d 1480, 1486 (11th Cir. 1989), *cert. den.* 497 U.S. 1011 (1990); *Markham v. International Association of Bridge, Structural and Ornamental Iron Workers*, 901 F.2d 1022, 1027 (11th Cir. 1990).

The Ninth Circuit's decision allowing fees for a preliminary injunction not based on the merits stands completely alone, in direct conflict with every other circuit.[3]

E. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE POLICIES BEHIND 42 U.S.C. § 1988

The majority rule – in fact, the unanimous rule outside the Ninth Circuit – is supported by the policies behind 42 U.S.C. § 1988. The Ninth Circuit's rule is not. In general, parties bear their own costs and attorney's fees. There is a justification for requiring a defendant to pay the plaintiff's attorney's fees if the defendant has been found to be "a violator of federal law." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978). No such finding was ever made in this case. The County was never determined to have done anything wrong. The district court simply found that the County had been sued and that the "balance of hardships" favored the plaintiff.

Alternatively, an enforceable settlement agreement is a reasonable substitute for a finding that the defendant

[3] The Federal Circuit and the D.C. Circuit have not addressed this issue. See *Brickwood Construction, Inc. v. United States*, 288 F.3d 1371, 1380 (Fed. Cir. 2002) (expressly not deciding the issue).

violated federal law; generally, parties do not settle unless there is some factual basis for liability. There was no settlement in this case. Plaintiff lost everything save the one claim, and then dismissed that claim. Even under the catalyst theory disapproved in *Buckhannon* there would be no basis for finding plaintiff to have prevailed, since the County never made any voluntary change in response to the lawsuit. Rather, at every step of the way, the County successfully opposed plaintiff's legal and factual contentions supporting his suit. The one remaining claim left to be tried on the merits was dismissed as moot, because plaintiff lost his case.

In summary, there is no public policy which could support an award of attorney's fees against a defendant who has never been found to have done the slightest thing wrong. *Buckhannon* and the other cases cited above reject the entire concept of awarding attorney's fees merely because the case is non-frivolous. The Ninth Circuit's decision is in conflict with all of these cases.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that this case should be reviewed to bring the Ninth Circuit's decision in line with the decisions of this Court and the decisions of every other circuit.

January 7, 2003

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

CHRISTOPHER D. LOCKWOOD
JORDAN N. GRAY
Attorneys for Petitioner County of Riverside

APPENDIX A

1107-300 F.3d 1092, *1107-; 1292-2002 U.S. App. LEXIS 16693, **1292-; 9924-002 Daily Journal DAR 95239924

TRACY L. WATSON, Plaintiff-Appellee, v. COUNTY OF RIVERSIDE, Defendant-Appellant, and LARRY D. SMITH; RICK SAYER, Chief Deputy; JEFFREY H. TURLEY, Sheriff's Captain; DOUGLAS J. BORDEN, Sheriff's Lieutenant; DANA C. FREDENDALL, Sheriff's Lieutenant, Defendants. TRACY L. WATSON, Plaintiff-Appellant, v. COUNTY OF RIVERSIDE; LARRY D. SMITH; RICK SAYER, Chief Deputy; JEFFREY H. TURLEY, Sheriff's Captain; DOUGLAS J. BORDEN, Sheriff's Lieutenant; DANA C. FREDENDALL, Sheriff's Lieutenant, Defendants-Appellees.

No. 01-56214, No. 01-56298

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 300 F.3d 1092; 2002 U.S. App. LEXIS 16693; 2002 Daily Journal DAR 9523

June 6, 2002*, Submitted, Pasadena, California

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).
August 20, 2002, Filed

Appeal from the United States District Court for the Central District of California Robert J. Timlin, District Judge, Presiding. D.C. CV-96-00148-RT. D.C. No. CV-96-00148-RT-04.

DISPOSITION Affirmed.

COUNSEL Paul R. Coble, Jones & Mayer, Fullerton, California, for the defendant-appellant-cross-appellee.

Christopher D. Lockwood, Lewis D'Amato, Brisbois & Bisgaard, San Bernadino, California, for the defendant-appellant-cross-appellee.

Larry J. Roberts, Michael P. Stone, P. C., Lawyers, Pasadena, California, for the plaintiff-appellee-cross-appellant.

Michael P. Stone, Michael P. Stone, P.C. Lawyers, Pasadena, California, for the plaintiff-appellee-cross-appellant.

Before: Cynthia Holcomb Hall, Barry G. Silverman and Johnnie B. Rawlinson, Circuit Judges. Opinion by Judge Silverman.

OPINION BY Barry G. Silverman

OPINION

SILVERMAN, Circuit Judge:

We hold today that a plaintiff who succeeds in obtaining a preliminary injunction can be deemed a "prevailing party" for purposes of 42 U.S.C. §§ 1988, even though he did not recover other relief sought in the lawsuit. We also hold that a district court does not abuse its discretion when it declines to assess against a defendant attorney's fees incurred by a plaintiff in opposing a motion to intervene brought by strangers to the lawsuit.

I. Facts

Tracy Watson, a former Riverside County deputy sheriff, participated in a highly publicized vehicle chase that culminated in the arrest of certain individuals. Watson wielded his police baton during the arrest and was suspected of using excessive force. Upon returning to the sheriff's station, he was ordered to prepare a report of the

incident. Watson alleged that he was denied the opportunity to consult with a lawyer prior to writing his report. Upon completion of his report, Watson was placed on administrative leave and eventually terminated.

Watson brought an action in the U.S. District Court alleging that the county and various individual deputies violated his Fourth, Fifth and Fourteenth Amendment rights by detaining him and compelling him to write his report, and by refusing to allow him to consult with a lawyer or a representative of his employee organization prior to writing the report. He also alleged violations of state law. Watson sought money damages and an injunction enjoining the county from using Watson's report at the hearing on Watson's appeal of his termination from the sheriff's office.

After analyzing the merits of Watson's claim, the court granted a preliminary injunction in the following terms:

> THEREFORE, IT IS ORDERED THAT defendants are prohibited from introducing in any manner in plaintiff's administrative appeal hearing concerning his discharge from employment with the County of Riverside, now pending before Arbitrator Alexander M. Cohn, or in any other official proceeding arising therefrom or connected therewith, the Riverside Sheriff's Department report written by plaintiff Tracy L. Watson on April 1, 1996 (report number SWR 96092026) and any and all information therefrom, and its derivative fruits.

Watson v. County of Riverside, 976 F. Supp. 951, 957 (C.D. Calif. 1997).

Nearly two years after the preliminary injunction issued, the district court granted summary judgment in favor of the defendants on all issues except one. It found a triable issue relating to Watson's claim for injunctive relief based on an alleged violation of due process. By that time, however, the administrative hearing had long since come and gone. The parties agreed that the claim for permanent injunctive relief had become moot. Accordingly, the court dismissed the case, leaving only Watson's claim for attorney's fees under 42 U.S.C. §§ 1988.

The court ruled that Watson was a "prevailing party" by virtue of his having won the preliminary injunction that prevented the use of Watson's report at the termination hearing. The court awarded Watson attorney's fees and costs totaling $153,988.41. The court reasoned:

> The object of this litigation was not to compel the County to reinstate Watson. Rather, Watson sought through this litigation a court decision that the arrest report was obtained in violation of his First, Fourth, Fifth, and/or Fourteenth Amendment rights. In the order granting Watson's motion for a preliminary injunction, the court ruled that he had shown a fair chance of success on the merits that Defendants deprived him of his right to due process by denying him the ability to consult with an attorney before and while writing the arrest report and ordered that Defendants were prohibited from introducing the arrest report at the hearing.
>
> Watson's preliminary injunctive relief satisfies the prevailing party test of *Texas State Teachers [Assoc. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 103 L. Ed. 2d 866, 109 S. Ct. 1486 (1989)]. Watson achieved "some of the benefit [he] sought

> in bringing suit" by obtaining an injunction prohibiting the admission of the arrest report at the hearing. *Texas State Teachers,* 498 U.S. at 791-92, 109 S. Ct. at 1493. Moreover, the injunction altered the legal relationship between the parties because it precluded the defendants from using the arrest report, which they otherwise would have been able to use, in the hearing.

(Second alteration in original).

With the exception of the time spent by Watson's lawyers responding to motions to intervene filed by third parties (which the district court denied) the court granted Watson his attorney's fees based on all of the time his lawyers spent on the case, not just the time allocable to the preliminary injunction. [**] Said the court:

> In this case, all of Watson's federal and state claims involved the same course of conduct – the circumstances involving Watson being required by certain individual defendants to write an arrest report in isolation without the ability to consult a union representative or attorney prior to or during the preparation of the report. Further, all of his claims sought the same relief of prohibiting the use of the arrest report in his administrative discipline appeal, which Watson achieved through the preliminary injunction. Therefore, Watson can recover attorney's fees relating to all of the state and federal legal theories he advanced in his various claims.

[**] The court deducted from the fees time spent on unrelated matters and duplicative work.

The County appealed the award of fees. Watson cross-appealed the denial of the fees relating to the intervention motions.

II. Jurisdiction and Standard of Review

We have jurisdiction over the final post-judgment order granting attorney's fees pursuant to 28 U.S.C. §§ 1291.

We review awards made pursuant to 42 U.S.C. §§ 1988 for an abuse of discretion. *See Hensley v. Eckerhart,* 461 U.S. 424, 437, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983). However, any elements of legal analysis that figure into district court decisions are reviewed de novo. *Webb v. Ada County, Idaho,* 195 F.3d 524, 526 (9th Cir. 1999).

III. Analysis

A. Watson is a prevailing party.

The district court did not err in ruling that Watson was a "prevailing party" in these circumstances. This case is very similar to *Williams v. Alioto,* 625 F.2d 845, 847 (9th Cir. 1980), in which we held that a plaintiff who obtains a preliminary injunction is a prevailing party for purposes of §§ 1988 even though the underlying case becomes moot. In *Williams,* two individuals obtained a preliminary injunction prohibiting officials of the San Francisco Police Department from engaging in certain investigative practices aimed at solving the so-called Zebra murders. The district court also awarded attorney's fees in connection with the preliminary injunction. While the police department's appeal of the preliminary injunction was pending, the Zebra case was solved and the investigation ceased. The appeal was dismissed as moot. The police department

then argued that because of the dismissal, the plaintiffs were not prevailing parties entitled to fees. We rejected that argument. We held that having won the preliminary injunction, the plaintiffs were prevailing parties notwithstanding the subsequent mooting of their case.

> We conclude that by obtaining the preliminary injunction appellees "prevailed on the merits of at least some of (their) claims." . . . The preliminary injunction prevented appellants from continued enforcement of their original guidelines, which is precisely the relief appellees sought. Appellees succeeded on a "significant issue in litigation, which achieved . . . the benefit the parties sought in bringing suit." . . . Our previous dismissal of the appeal as moot and vacation of the district court judgment does not affect the fact that for the pertinent time period appellees obtained the desired relief, upon findings by the district court that the original guidelines were unconstitutional.

Williams, 625 F.2d at 847-848 (internal citations omitted).

We face a very similar situation here. Having succeeded in winning a preliminary injunction that prevented the use of his report at the administrative hearing, Watson obtained significant, court-ordered relief that accomplished one of the main purposes of his lawsuit. This is so even though he failed to prevail on his other claims.

The County argues that *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health,* 532 U.S. 598, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001) prohibits a fee award here because Watson did not recover a "judgment" or a "consent decree." *Buckhannon* holds that to be considered a prevailing party, one must have obtained a "judicial

imprimatur" that alters the legal relationship of the parties, such as a judgment on the merits or a court-ordered consent decree; it is not enough merely to have been a "catalyst" in causing a voluntary change in the defendant's conduct. *Buckhannon,* 532 U.S. at 600. Judgments and consent decrees are examples of that, but they are not the only examples.

A preliminary injunction issued by a judge carries all the "judicial imprimatur" necessary to satisfy *Buckhannon.* In this case, the County was prohibited from introducing Watson's report at the termination hearing for one reason and for one reason only: because Judge Timlin said so. Under *Williams,* Watson was a prevailing party. And under *Buckhannon,* he was not a mere catalyst of an extra-judicial voluntary change in conduct. There was nothing voluntary about the County's inability to use the report.

We recognize that there will be occasions when the plaintiff scores an early victory by securing a preliminary injunction, then loses on the merits as the case plays out and judgment is entered against him – a case of winning a battle but losing the war. The plaintiff would not be a prevailing party in that circumstance. But this case is different because Watson's claim for permanent injunctive relief was not decided on the merits. The preliminary injunction was not dissolved for lack of entitlement. Rather, Watson's claim for permanent injunction was rendered moot when his employment termination hearing was over, after the preliminary injunction had done its job.

B. The District Court Did Not Abuse Its Discretion When It Awarded Watson Fees For Time Spent Preparing Unsuccessful Claims.

Next, the County contends that the district court abused its discretion by awarding Watson attorney's fees for time expended on claims that he ultimately lost.

In *Hensley v. Eckerhart,* 461 U.S. 424, 433, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983), the U.S. Supreme Court proscribed a two-step process for calculating attorney's fees in a case of partial or limited success. A court must consider (1) whether "the plaintiff failed to prevail on claims that were unrelated to the claims on which he succeeded," and (2) whether "the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Id.* at 434. Deductions based on limited success are within the discretion of the district court. *See Sorenson v. Mink,* 239 F.3d 1140, 1147 (9th Cir. 2001).

Here, the district court did not err in ruling that Watson's claims all involved the same conduct and were sufficiently related to one another to entitle him to fees for all the work performed. Likewise, the district court did not abuse its discretion in ruling that the fees requested were not out-of-whack with Watson's level of success in the action.

The County contends that the court should have limited its award of fees only to work done in securing the preliminary injunction, arguing that "where the plaintiff achieves a single success and loses everything else, the proper procedure is a denial of all fees incurred after the date of the single success." The only authority it presents for that contention is a case holding that a court did not abuse its discretion when it denied recovery of attorney's

fees incurred after a plaintiff's final success. *See Outdoor Systems Inc. v. City of Tucson,* 997 F.2d 604, 619 (9th Cir. 1993). Far from mandating that result, *Outdoor Systems* emphasizes a district court's discretion in such matters: "Our limited review is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." 997 F.2d at 619, quoting *Hensley,* 461 U.S. at 437 (internal quotation marks omitted). Here, it was within the district court's discretion to award all fees, rather than only those incurred up to the date of the preliminary injunction. The court did not abuse its discretion in its calculation of the fee award.

C. The District Court Did Not Abuse Its Discretion When It Denied Watson Attorney's Fees for Time Spent Opposing Intervention.

On cross-appeal, Watson argues that the district court erred in failing to assess against the County the attorney's fees he incurred in opposing motions to intervene filed by the United States and an interested individual.

A plaintiff can be awarded fees incurred opposing intervention if the defendant either joined the intervenor's motion or if the intervenor's acts were "made necessary by [the defendant's] opposition to legitimate claims of the party seeking the award." *Love v. Reilly,* 924 F.2d 1492, 1495 (9th Cir. 1991). Neither of those circumstances existed here. The district court did not err in denying Watson his fees connected with opposing the intervenors' motions.

IV. Conclusion

For the foregoing reasons, we affirm the district court.

AFFIRMED.

APPENDIX B

TRACY L. WATSON, Plaintiff, v. COUNTY OF RIVERSIDE, et al., Defendant. CASE NO. EDCV-96-0148-RT (VAPx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

976 F.Supp. 951; 1997 U.S. Dist. LEXIS 13797; 97 Daily Journal DAR 13065

September 5, 1997, Decided
September 5, 1997, Filed

DISPOSITION: Plaintiff's motion for preliminary injunction GRANTED.

COUNSEL: For Plaintiff: Michael P. Stone, Muna Busailah, Marc Berger, Larry J. Roberts, MICHAEL P. STONE P.C., Pasadena, CA.

For Defendants: Martin J. Mayer, Paul R. Coble, MAYER, COBLE & PALMER, Long Beach, CA.

JUDGES: ROBERT J. TIMLIN, UNITED STATES DISTRICT JUDGE.

OPINION BY: ROBERT J. TIMLIN

OPINION: ORDER GRANTING MOTION OF PLAINTIFF TRACY L. WATSON FOR ISSUANCE OF PRELIMINARY INJUNCTION

Plaintiff Tracy L. Watson's Motion for Issuance of Preliminary Injunction ("motion") was submitted for decision. The court, the Honorable Robert J. Timlin, has read and considered the moving, opposing and reply papers, and reviewed the exhibits submitted therewith. Based on such consideration, the court concludes as follows:

I.

BACKGROUND

On April 1, 1996, plaintiff Tracy L. Watson ("plaintiff" or "Watson"), a deputy sheriff for the County of Riverside, participated in a vehicular pursuit which culminated in an arrest of certain individuals. He used his baton during the arrest. Upon returning to the Riverside Sheriff's Station, plaintiff was ordered to prepare a report concerning the pursuit and arrest ("report"). Watson was denied the opportunity to consult with his attorney prior to writing the report after an attorney summoned by the Riverside Sheriffs' Association arrived to assist him. Upon completion of the report, he was placed on administrative leave, and ultimately terminated from his employment with the Riverside Sheriff's Department ("Department").

In his complaint, Watson alleges that defendant County of Riverside ("County") and the individual officer defendants violated his federal constitutional rights guaranteed by the Fourth and Fourteenth Amendments by detaining him and compelling him to be isolated in a room while writing his report, by refusing to permit him to consult with the president of the employee organization, of which he is a member, and by seizing and detaining him without warrant or probable cause. Watson further claims that defendants violated his federal constitutional rights guaranteed under the Fifth and Fourteenth Amendments by refusing to allow him to consult with counsel at a critical stage of the administrative and criminal investigation. Finally, Watson alleges that County and the individual officer defendants violated his rights under the California Public Safety Officers Procedural Bill of Rights Act ("Act") (Government Code sections 3300 et seq.).

In the present motion for preliminary injunction, plaintiff Watson seeks to have this Court suppress his written report and to prohibit defendants' introduction of it in the pending arbitration appeal hearing concerning his termination from the Sheriff's Department or in any other final proceeding arising therefrom or connected therewith. Watson seeks suppression of the report on the grounds that the defendants violated his Fifth Amendment privilege against self-incrimination and his "corollary right to consult counsel in order to intelligently exercise" that privilege, and that they violated his constitutional right to due process by denying him the opportunity to consult with his attorney before or while writing it. He argues that a further basis for injunctive relief is the Department's violation of the Act. See California Government Code section 3309.5(c).[1]

ANALYSIS[2]

A. Criteria for Issuance of a Preliminary Injunction

The equitable remedy of injunctive relief is first triggered by a claim of irreparable injury and inadequate legal remedies. *Weinberger v. Romero-Barcelo,* 456 U.S. 305,

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[1] That subsection provides, in pertinent part: "In any case where the . . . court finds that a public safety department has violated any of the provisions of this chapter, the court shall render appropriate injunctive or other extraordinary relief to remedy the violation. . . ."

[2] Defendants urge that plaintiff's motion is barred by the doctrine of laches. The court has considered the evidence presented by both plaintiff and defendants. It finds that plaintiff has exercised due diligence in filing this motion. Consequently, the court rejects defendants' claim of laches.

312, 102 S. Ct. 1798, 1803, 72 L. Ed. 2d 91 (1982). Once a plaintiff satisfies those general equitable requirements, he must meet the burdens imposed under either the "traditional" test or the "alternative" test for obtaining a preliminary injunction. The traditional test requires the following: (1) strong likelihood of success on the merits, (2) possibility of irreparable injury to plaintiff if relief is not granted, (3) a balance of hardships favoring plaintiff, and (4) advancement of the public interest in certain kinds of cases. *Los Angeles Memorial Coliseum Commission v. National Football League,* 634 F.2d 1197, 1200-1201 (9th Cir. 1980).

In the Ninth Circuit, a party may also meet its burden under the alternative test, by demonstrating *either* (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. Id. at 1201. A "serious question" is one as to which the moving party has a "fair chance of success on the merits." *Sierra On-Line, Inc. v. Phoenix Software, Inc.,* 739 F.2d 1415, 1421 (9th Cir. 1984). These are not separate tests, but the outer reaches of a single continuum. Id.; see also *Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1073 (9th Cir., 1996). Indeed, the two tests represent "a continuum of equitable discretion whereby the greater the relative hardship to the moving party, the less probability of success must be shown." *Regents of University of California v. ABC, Inc.,* 747 F.2d 511, 515 (9th Cir. 1984).

B. The Facts[3]

The parties agree, to a substantial degree, as to the facts underlying this action. On April 1, 1996, plaintiff was a deputy Riverside County Sheriff involved in the high-speed pursuit of a truck driven by a suspected smuggler of illegal aliens. The truck contained a number of persons who were suspected of being illegal aliens. The pursuit ended with the apprehension of two suspects. During the arrest, Watson struck the two suspects with his baton. The arrest and use of force by Watson and another deputy sheriff were televised. According to defendant Lieutenant Fredendall ("Lt. Fredendall"), one of plaintiff's superior officers, it was not clear that the suspects had done anything to warrant being struck. Thus, Lt. Fredendall was aware at the time he viewed the videotape of the arrest, in the afternoon of April 1, 1996, that plaintiffs use of force could be "out of policy" and possibly the subject of administrative and criminal investigation. There is some dispute as to when the administrative and criminal investigations actually began, but persuasive uncontroverted evidence establishes that defendants Lt. Fredendall, Sayre, Turley, and Borden were well aware before Watson wrote the report or while he was in the process of writing it that such a criminal investigation by the Los Angeles County

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[3] The court is required by Rule 52(a) of the Federal Rules of Civil Procedure to set forth the findings of fact and conclusions of law which constitute the grounds for its ruling on this motion. Such findings and conclusions need not be explicit but may be implicit in the order. Additionally, such findings and conclusions are not binding adjudications, and the court may come to opposite conclusions at the trial on the merits. *University of Texas v. Camenisch* 451 U.S. 390, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981).

Sheriff was likely, and also that an internal administrative disciplinary proceeding affecting his employment was imminent.

Subsequent to the arrest, plaintiff was directed to return to the Riverside Sheriff's Station. When Watson arrived at the station, he was met by Lt. Fredendall, who directed him to a secluded room to write his report concerning the pursuit and arrest. Such reports of official action are routinely required when an arrested suspect is not to be released from the detention facility prior to his/her initial court appearance. Watson asked Lt. Fredendall if he needed an attorney and Lt. Fredendall replied that he might need one but did not need one in order to write his report. Watson asked if he was being ordered to write the report, and Lt. Fredendall then ordered him to write it. Plaintiff wrote the report without the assistance of counsel regarding whether he should write the report and if he chose to write it, without her assistance while he was writing it.

Before Watson began writing the report, an attorney from the Riverside Sheriffs' Association came to the station to represent him. The attorney had been obtained by Deputy Harness, a director of the Sheriffs' Association, when Watson asked Harness to contact an attorney. It is undisputed that after the attorney arrived at the station, located Watson, and had begun to consult with him, she was directed by Lt. Fredendall to leave the room where Watson was writing the report and wait in another part of the station. Watson's attorney testified in her deposition that she believed that she might be arrested if she attempted to return to talk to Watson. Watson testified in his deposition that his attorney advised Lt. Fredendall that she had a right to be there and she was Watson's

attorney. His attorney did not so testify in her deposition. The evidence does not show that Watson or his attorney specifically asserted Watson's right to counsel or his Fifth Amendment privilege not to incriminate himself by writing the report. Watson states that the totality of the circumstances – his emotional state, his seclusion, and the manner in which Lt. Fredendall ordered the attorney to leave – rendered any such objection or request useless.

Ultimately, Watson completed the report, showed it to his attorney for review and turned it over to his superiors. He was then placed on administrative leave, and later terminated as an employee of the Department by defendant Sheriff Smith.

C. The balance of hardships tips decidedly in favor of plaintiff

Plaintiff Watson argues persuasively that he will suffer irreparable injury if his report is used in the arbitral review of his termination and its contents is one of the evidentiary bases for the arbitrator's deciding against him. This is because of the finality of a binding arbitration. The court notes that defendants have not posited any harm which they would suffer by being prevented from introducing the report at the arbitration proceeding. Thus, the court finds that the balance of hardships tips decidedly in plaintiff Watson's favor.

D. Plaintiff Watson has not raised "serious questions" with a "fair chance of success On the merits" as to his claim that his Fifth Amendment privilege against self-incrimination was violated

The court is mindful of the conundrum presented by the facts of this case. A police officer's duty to provide a report concerning his official actions is an essential element in the administration of our criminal justice system, and crucial to the maintenance of public confidence in it. Here, an officer seeks suppression of such a report on the basis of his Constitutional right not to incriminate himself. Thus, the public duty and the individual's rights collide. The parties find themselves in the classic clash of two fundamental principles of constitutional democracy: the ability of government to function and the individual's rights, including the right to remain silent under the Fifth Amendment. This court is called upon to navigate the intersection of these constitutional principles under the circumstances of this case.

Watson argues that his Fifth Amendment right was implicated in the circumstances surrounding the writing of his arrest report. He first relies on the general rule against relegating police officers to a "watered-down version of constitutional rights" as noted by the Supreme Court in *Garrity v. New Jersey,* 385 U.S. 493, 500, 87 S. Ct. 616, 620, 17 L. Ed. 2d 562 (1967), and *Gardner v. Broderick,* 392 U.S. 273, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1968). In both of those cases, however, unlike here, police officers were being compelled to testify before either the Attorney General or the Grand Jury in connection with criminal investigations of their past actions and both faced the loss of their employment if they either invoked the Fifth

Amendment or refused to waive it. The Court held that Fifth Amendment values and purposes were compromised when police officers were forced to choose between their jobs and self-incrimination. The element of compulsion, present in both *Garrity* and *Gardner,* is critical to an implication of the Fifth Amendment. Indeed, in *Gardner,* the Court indicated that if the element of compulsion were removed, an officer could constitutionally be fired for failing to answer questions relating to job performance; the means for removing the compulsion has generally been through the doctrine of immunity such that the answers would not be used in a criminal proceeding against the officer.

This court must determine whether the arrest report at issue here was "compelled" in the same sense as the officers' testimony in *Garrity* and *Gardner.* Plaintiff relies on a host of cases to buttress his assertion that his arrest report was compelled. However, those cases are readily distinguishable from the facts before the court in this case, mainly because they each involved the official questioning of an individual regarding suspected prior misconduct as a public employee, and not a public employee's job requirement of completing a report. For example, *Spevack v. Klein,* 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967) involved an attorney's invoking of his Fifth Amendment privilege in the midst of disciplinary proceedings; *Lefkowitz v. Turley,* 414 U.S. 70, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973) involved the refusal by two architects who had contracted with the State of New York, to waive the privilege when summoned to testify before a grand jury investigating criminal corruption in public contracting practices.

The court finds more persuasive arguments, on more parallel facts, in *United States v. Rios Ruiz,* 579 F.2d 670, 675 (1st Cir. 1978) (use, in the officer's criminal trial, of an arrest report made by the officer did not violate the privilege because the "fifth amendment proscribes compelled self-incrimination, not incriminating statements"); in *Commonwealth v. Harvey,* 397 Mass. 351, 491 N.E.2d 607, 611 (Mass. 1986) (in prosecution for larceny and civil rights violations, a police officer attempted to exclude his statements made in an administrative investigation; acknowledging that defendant, as a police officer, was required by department rules to answer questions regarding his duties as a police officer, the court nevertheless concluded that the "fact that there existed the possibility of adverse consequences from the defendant's failure to cooperate does not demonstrate that the defendant was 'compelled' to incriminate himself"); and in *State v. Falco,* 60 N.J. 570, 292 A.2d 13 (1972) (New Jersey Supreme Court limited *Garrity,* and *Gardner* to their facts, recognizing that they dealt with police officers subject to questioning for suspected prior misconduct and not with the failure to perform specific duties expected of all police officers, and refused to exclude from the officer's criminal trial a report which the officer was required to prepare).

Accordingly, the court finds that the report in issue here regarding Watson's arrest of an incarcerated prisoner was a requirement of plaintiff's job and did not constitute a compelled self-incrimination. As the element of compulsion was absent, the court finds that there is not a reasonable probability of success on the merits of Watson's contention that his Fifth Amendment right was violated by defendants when they ordered him to write the report. In weighing this factor against the balance of hardships and

possibility of irreparable injury to Watson, the court will deny the motion as resting on this assertion.

E. Plaintiff has raised a serious question of his being deprived by defendants of his due process right to consult counsel before and during the time he prepared his report

Watson argues that even if the court finds that his report was not coerced, and thereby obtained without violating his Fifth Amendment privilege against self-incrimination, the circumstances clearly point to a violation of his Fourteenth Amendment right to due process by depriving him of counsel before and during his writing of the report, if he chose to write it. The requisites of due process necessarily vary according to the peculiarities of each situation. The touchstone of the analysis is fundamental fairness. In this case, the plaintiff was by all accounts emotionally upset and distressed. As earlier determined by this court in its ruling denying defendants' motion to dismiss the complaint, Watson had been involved in a "major incident." He requested an attorney and one arrived and began to consult with him before he began to write the report. The attorney, however, was ordered from the room by Lt. Fredendall within five minutes after she met Watson. Watson was ordered by Lt. Fredendall to prepare his report without advice of counsel. At that time, he had been told by his superior officers that the situation "did not look too good" and several deputies had suggested that he get an attorney. He had also been told by Lt. Fredendall that he was expected to document in the report any use of force. Both plaintiff and the defendant officers were aware at the time that the report was being written that there was a likelihood of both an administrative and a criminal investigation of Watson's conduct during the arrest of the

suspected illegal aliens. Fredendall also knew that the arrest report could be used against the authoring officer.

The court finds useful the reasoning in *Gabrilowitz v. Newman,* 582 F.2d 100, 105 (1st Cir. 1978). In that case, a student had been denied the assistance of counsel at a student disciplinary hearing, while a criminal case against the student was pending, and the student sought injunctive relief restraining the university from conducting the hearing unless he was allowed such representation. The *Gabrilowitz* court recognized that it, too, lacked compelling precedent, and so applied the traditional due process balancing test as set out by the Supreme Court in *Mathews v. Eldridge,* 424 U.S. 319, 334-335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976):

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

In the instant case, as in *Gabrilowitz,* the private interest of plaintiff Watson in making "intelligent, informed choices between the risks presented" in the writing of his arrest report is substantial. Indeed, hinging on the content

of his report were not only his continued employment but also possible criminal liability.[4] Thus, the consequences of plaintiff's writing of what otherwise was a routine report "'reached well beyond the . . . [station] walls in terms of potential effect upon this plaintiff.'" *Gabrilowitz, supra* at 106 (quoting the District Court's ruling).

If Watson had been allowed the continued representation of his counsel at the time she was ordered from the report writing room, which was before he began to write the report, she might have advised him that he could choose not to write the report with the possible consequence of termination of his employment for refusal to write the report. Another alternative would be to write the report with two possible consequences resulting therefrom. He could be impliedly waiving his Fifth Amendment right against self incrimination and the contents of the report could be used in a state and/or federal prosecution against him based in whole or in part on the statements in the report. In addition, the contents of such report also could be used punitively against him by his employer in an administrative employment disciplinary proceeding due to his involvement in the arrest of the suspected aliens on April 1, 1996. Further, his attorney could have advised him that before writing the report, he might seek immunity or at least transactional immunity from the state and federal criminal prosecutorial authorities precluding any criminal prosecution against him for his conduct during the subject events. Additionally, if he chose to write the

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[4] The *Gabrilowitz* court noted that it is the possibility of subsequent criminal prosecution that triggers the right to counsel in order to ensure due process. *Gabrilowitz, supra* at 104, fn. 4, citing *Mathis v. United States*, 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968).

report, counsel could have advised him respecting anything he wrote possibly incriminating him for potential criminal prosecution and/or being used against him in an employee disciplinary proceeding.

Without such advice of counsel, there is a substantial risk of Watson's being deprived erroneously of his interest in not being fired from his employment and not being prosecuted for criminal offenses. Defendants provided no additional or substitute procedural safeguard against such a deprivation. Defendants' allowing Watson to show his report to counsel after he completed it without her consultation and advice was no such safeguard because at that time he had already chosen without her advice to write the report, and the circumstances were sufficient to cause Watson and his counsel reasonably to believe that he could not change or redo the report in such a way as to protect his Fifth Amendment right against self incrimination.

The government's interest in obtaining the report is important, but is not particularly burdened by the provision of the constitutional safeguard of counsel. As pointed out, the government has administrative remedies available to it. Thus, the court finds that this traditional due process balancing test, guided as it must be by the touchstone of fundamental fairness, raises serious questions as to whether plaintiff was deprived of his constitutional due process right to counsel before he wrote the report and while he wrote it after he chose to write it. The court concludes that plaintiff has a fair chance of success on the merits of such contention. Under the alternative test for issuance of a preliminary injunction, discussed above, a preliminary injunction, as requested, should properly issue in this case. Injunctive relief in the form of suppressing the report in the arbitral appeal hearing concerning Watson's employment termination is appropriate because

the balance of harms tips sharply in his favor without such relief.[5]

III.

DISPOSITION

Plaintiff's motion for a preliminary injunction is GRANTED.

THEREFORE, IT IS ORDERED THAT defendants are prohibited from introducing in any manner in plaintiff's administrative appeal hearing concerning his discharge from employment with the County of Riverside, now pending before Arbitrator Alexander M. Cohn, or in any other official proceeding arising therefrom or connected therewith, the Riverside Sheriff's Department report written by plaintiff Tracy L. Watson on April 1, 1996 (report number SWR 96092026) and any and all information therefrom, and its derivative fruits.

9/5/97

DATE

ROBERT J. TIMLIN

UNITED STATES DISTRICT JUDGE

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[5] Based on the court's analysis and disposition based on federal constitutional grounds, it need not and will not address the plaintiff's assertion that as to his supplemental state claim he is entitled to issuance of an injunction under California Government Code section 3309.5 because the defendants violated his rights under the Act.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

TRACY L. WATSON, Plaintiff, v. COUNTY OF RIVERSIDE, et al., Defendants.	) CASE NO. ED CV 96-0148 RT (YAPx)) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.) (Filed Mar. 9, 1999)

Defendants County of Riverside ("County"), Larry D. Smith ("Smith"), Rick Sayer ("Sayer"), Jeffrey H. Turley ("Turley"), Douglas J. Borden ("Borden"), Dana C. Fredendall ("Fredendall") (collectively, "defendants")'s motion for summary judgment ("motion") against Plaintiff Tracy L. Watson ("Watson") was submitted for decision. The Court, the Honorable Robert J. Timlin, has read and considered the moving, opposing and reply papers, as well as the supplemental briefing and the admissible evidence. The Court concludes as follows:

I.
BACKGROUND

On April 17, 1996, Watson filed a complaint for damages and for injunctive and declaratory relief alleging three separate claims arising under (1) 42 U.S.C. §1983 ("section 1983"), (2) section 3303 of the California Public Safety Officers Procedural Bill of Rights Act ("section 3303"), and (3) the California Constitution, Article I, §§ 1-3, 7, and 13. On

June 17, 1996, this Court denied defendants' motion to dismiss the complaint for failure to state a claim on which relief could be granted, and on September 5, 1997 the Court granted Watson's motion for a preliminary injunction prohibiting defendants from using an arrest report written by Watson at an administrative appeal hearing concerning his discharge from County employment. All defendants now move for summary judgment.

II.
UNDISPUTED MATERIAL FACTS

The court finds that the following facts are undisputed material facts, supported by admissible evidence:

On April 1, 1996, Watson was involved in a high speed pursuit of a truck suspected of containing illegal aliens. He ultimately participated in the arrest of certain occupants of the truck. In effecting this arrest, Watson used his police baton. The use of force was videotaped and publicly televised. After viewing the videotape that afternoon, defendant Fredendall, who was a lieutenant with the Riverside County Sheriff's Department and one of Waton's superior officers, was aware that Watson's use of force could subject him to administrative and criminal investigation.

After the arrest, Watson was ordered to return to the Riverside Sheriff's' station to write his arrest report. It is the responsibility of a Riverside County deputy sheriff involved in an arrest incident, with the exception of a shooing involving an officer, to write an arrest report. Any use of force during the arrest must be documented, either in the arrest report, or, at the officer's discretion, in a separate memorandum. Different procedures govern a deputy's report-writing obligation in the case of an officer-involved

shooting. Officers involved in shooting incidents are allowed to consult with an attorney before writing any report.

When plaintiff returned to the station, he was met by Fredendall, who ordered him to prepare his arrest report. After receiving this order, but while still outside the station, Watson was approached by William Hartness ("Hartness"), a representative of the Riverside Sheriffs' Association ("RSA"), who asked if Watson would like to consult with RSA attorney. Watson said that he would.

Fredendall then escorted Watson to a secluded office, in which Watson was expected to write the report. The doors to the room were locked on the outside, so that no one could enter the room without a key, but were not locked from the inside, so that Watson could leave the room without assistance. He was not allowed to write his report in the station's "report writing room," because he could not be isolated in that room. When Watson asked Fredendall whether he needed an attorney, Fredendall replied that Watson might need an attorney later, but did not need one to write the report.

The RSA attorney summoned by Hartness, Karen Cote ("Cote"), arrived at the station and joined Watson in this room. After roughly five or ten minutes, Fredendall came to the room and directed Cote to leave and wait in another part of the station. Watson was allowed to briefly telephone his girlfriend, after which Fredendall removed the phone from the room. Watson then composed his report over the next sixty to ninety minutes. Fredendall came into the room several times and asked if Watson had finished the report.

Once Watson completed the report, he was allowed to meet with Cote and RSA President Dan Swift ("Swift"). Cote and Swift were allowed to review the report and meet with Watson for roughly 30 minutes. After this meeting, Watson gave the report to his superiors and was immediately placed on administrative leave. He was later terminated as an employee of the County.

III.
ANALYSIS

A. Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, a district court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admission on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Supreme Court and the Ninth Circuit have established the following standards for consideration of such motions: "If the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issue of material fact, "the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, '*specific facts* showing that there is a genuine issue for trial.'" *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n.* 809 F.2d 626, 630 (9th Cir. 1987) (quoting Fed. R. Civ. P. 56(e) (emphasis added) and citing *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 479 U.S. 949, 107

S.Ct. 435, 93 L.Ed.2d 384 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986)). With respect to these specific facts offered by the non-moving party, the court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party. *T.W. Elec. Serv.*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)).

Rule 56(c) nevertheless requires this Court to enter summary judgment, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 106 S. Ct. at 2552. The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient: "[T]here must be evidence on which the jury could reasonably find for the [non-moving party]," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). In order to defeat a motion for summary judgment, the plaintiff must present significant probative evidence tending to support the complaint. *T.W. Elec. Serv.*, 809 F.2d at 630. This court thus applies to either party's motion for summary judgment the same standard as for a motion for directed verdict: "[W]hether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.*

B. Watson's Section 1983 Claims for Damages

Watson contends that defendants deprived him of his First, Fourth, Fifth and Fourteenth Amendment rights, and seeks damages and injunctive relief pursuant to section 1983. The Court concludes that as a matter of law summary judgment must be entered as to the section 1983 claims for damages in favor of the officer defendants in their individual capacities on qualified immunity grounds. The Court further concludes that Watson has failed to submit sufficient probative evidence to survive summary judgment on his damages claims under section 1983 against the County. Finally, the Court concludes that triable issues of material fact exist with respect to Watson's claims for injunctive relief against the various individual defendants in their official capacities.

1. Qualified Immunity as to the Officer Defendants

The named individual defendants have not moved for summary judgment on Watson's section 1983 claims on the grounds of qualified immunity. They have raised the issue, however, as an affirmative defense in their answer to Watson's complaint, and the issue was fully briefed by the parties on defendants' motion to dismiss. Ample authority suggests that *sua sponte* entry of summary judgment on this ground is appropriate, and perhaps even required, where there is no genuine issue of material fact for trial and the losing party has been given adequate notice that the sufficiency of his or [sic] claim will be in issue. *See Buckingham v. United States*, 998 F.2d 735, 742 (9th Cir. 1993); *Desales v. Woo*, 860 F. Supp. 1436, 1446-47 n.8 (N.D. Cal. 1994) ("The court may decide the issue of qualified immunity, a question of law which should be

decided 'at the earliest possible stage of litigation,' *Hunter v. Bryant*, 502 U.S. 224, ___, 112 S. Ct. 534, 536 (1991), if the party against whom summary judgment is being granted has had a full opportunity to address the issue."); *Doyle v. Coombe*, 976 F. Supp. 183, 187 (W.D.N.Y. 1997) ("I find that Doyle's claims are barred in part by the doctrine of qualified immunity, and, thus, invoke my inherent power to grant summary judgment *sua sponte*, in part, based upon the defense of qualified immunity.").

Qualified immunity shields these individual officer defendants from section 1983 liability for money damages if a reasonable officer could have believed that the challenged actions did not violate clearly established law. *See Knox v. Southwest Airlines*, 124 F.3d 1103 (9th Cir. 1997); *Act-up[!]/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993). Thus, the threshold inquiry is whether the governing law was clearly established at the time the defendants acted. The Court concludes that it was not.

Watson contends that the individual officer defendants deprived him of four different clearly established constitutional rights during the report writing incident. The Court will consider these contentions in turn.

a. First Amendment

In its June 17, 1996 order denying defendants' motion to dismiss, the Court observed:

> [T]he law is not settled as to whether a peace officer represented by an employee association has a First Amendment, freedom of association right to consult with an association attorney before preparing a report on an incident in which the employee was involved, and was to which incident the

> employee may face disciplinary and/or criminal proceedings. Because the court cannot say that the cases cited by Watson could not form the basis for extending such a right to one in his situation, and because defendants have failed to establish that there is settled law that one in Watson's circumstances does not have such a right, the court will not grant the motion to dismiss. . . .

Order Denying Motion of [Defendants] to Dismiss Complaint Pursuant to Federal Rule of Civil Procedure, Rule 12(b)(6) at 7. Obviously, the contours of any such First Amendment right were not clearly established on April 1, 1996, the date of the individual defendants' alleged unconstitutional conduct.

b. Fourth Amendment

Although the application of the Fourth Amendment to many situations is needed clearly established for purposes of section 1983 liability, that cannot be said with respect to the instant case. Watson makes novel arguments concerning the application of the Fourth Amendment's reasonableness standard to what he describes as his "detention." He cites no case, and the court has located none, where a state employee was held to have been unreasonably seized in violation of the Fourth Amendment by a supervisor's command that the employee perform a sensitive job task in isolation. Again, if the Court were ultimately to hold that the sequestration of Watson amounted to a Fourth Amendment seizure, such holding would itself constitute an extension of existing law. Individual officer defendants cannot be held liable in money damages for failing to foresee such expansion of the law.

c. Fifth Amendment

The same can be said of Watson's claim that his Fifth Amendment right to be free from compelled self-incrimination was violated by the individual defendants requiring him under the circumstances to write the subject arrest report. Any conclusion by this Court that Watson's Fifth Amendment rights were violated in this respect would constitute a ruling of first impression. Watson not having cited any supporting authority for such a proposition and the Court not having found any such authority. Section 1983 liability for damages cannot be imposed on the officer defendants on the basis of such an extension of the law.

d. Fourteenth Amendment – Procedural Due Process

In its order granting Watson's request for a preliminary injunction, the Court observed that it "lacked compelling precedent" to guide its decision. Ultimately, the Court concluded that Watson had "rais[ed] serious questions" as to the process due him under the federal constitution, and had a "fair chance of success on the merits" of his procedural due process claim. The opinion clearly demonstrates, however, that once again the Court was analogizing from diverse precedents and was operating on the outer boundary of the procedural due process right. The right to consult with an attorney before writing his arrest report which Watson discerns as part of the Fourteenth Amendment's due process guarantee was not clearly established in April 1996.

Watson makes challenging arguments for the extension of the law and for the application of established

constitutional principles in new contexts. The doctrine of qualified immunity, however, shields the officer defendants from damages liability for depriving Watson of any such newly-extended rights.

2. Claims against the County

Presumably, Watson's section 1983 claim against the County rests on either an unlawful policy or custom theory, *see Monnell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 98 S. Ct. 2018 (1978), a failure to train theory, *see City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989), or on an unconstitutional act of a policymaker theory, *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292 (1984). Watson has not submitted any evidence sufficient to overcome summary judgment as to any of these potential theories. Although the County has not extensively briefed the specific question of its so called *Monell* liability, the Court does conclude that summary judgment is proper on the section 1983 damages claims against the County as Watson had ample notice that this dispositive motion was directed at all of the claims of the complaint, *see Buckingham*, 998 F.2d at 742, and did not present any evidence of an unlawful policy, custom or practice of the County or of any failure by the County to train the individual officer defendants or of any unconstitutional conduct performed by a policy maker.

Thus, the Court will grant defendants' motion for summary judgment as to the section 1983 claims against them insofar as the relief being sought is damages.

3. Injunctive Relief Claims against the Individual Officer Defendants

Watson's complaint seeks injunctive relief, as well as damages. Although the current scope of injunctive relief sought by Watson is unclear, particularly in view of the Court's previous grant of preliminary injunctive relief as to the use of the arrest report at Watson's administrative appeal hearing regarding his discharge from County employment, the Court must consider the merits of defendants' summary judgment motion nonetheless. Qualified immunity, of course, has no application to Watson's request for injunctive relief. *See Aldrich v. Knab*, 858 F. Supp. 1480, 1500 n.8 (W.D. Wash. 1994) ("The qualified immunity defense applies only to plaintiffs' claim for civil damages against the individual defendants, and does not affect the Court's ruling on plaintiffs' claims for injunctive relief.").

Watson opposes summary judgment as to his section 1983 claims on two grounds. He argues that the report-writing incident deprived him of (1) his Fifth Amendment right to be free from compelled self-incrimination and (2) his Fourteenth Amendment right to procedural due process. Although the Court's order denying defendants motion to dismiss suggested that Watson had a [sic] pled a colorable claim for deprivation of his First Amendment associational rights, Watson explicitly and exclusively bases his opposition to defendants' summary judgment motion only on deprivation of his Fifth and Fourteenth Amendment rights.[1] Accordingly, the Court treats Watson's

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[1] *See also Plaintiff's Supplemental Memorandum in Opposition to Summary Judgment Motion Regarding Newly Announced Case on Point*

(Continued on following page)

section 1983 theories based on deprivations of his First and Fourth Amendment rights as abandoned.

a. Fifth Amendment

The court adheres to its conclusion in the preliminary injunction order that the report was not the product of Fifth Amendment compulsion. *See Watson v. County of Riverside*, 976 F. Supp. 951 (C.D. Cal. 1997) (citing *United States v. Rios Ruiz*, 579 F.2d 670, 675 (1st Cir. 1978) (use, in the officer's criminal trial, of an arrest report made by the officer did not violate the privilege because the "fifth amendment proscribes compelled self-incrimination, not incriminating statements"); *Commonwealth v. Harvey*, 491 N.E.2d 607, 611 (Mass. 1986) (in prosecution for larceny and civil rights violations, a police officer attempted to exclude his statements made in an administrative investigation; acknowledging that defendant, as a police officer, was required by department rules to answer questions regarding his duties as a police officer, the court nevertheless concluded that the "fact that there existed the possibility of adverse consequences from the defendant's failure to cooperate does not demonstrate that the defendant was 'compelled' to incriminate himself"); and *State v. Falco*, 60 N.J. 570, 292 A.2d 13 (1972) (reviewing cases and declining to exclude from officer's criminal trial a report which the officer was required to prepare)).

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at 1 ("This action seeks an appropriate remedy for the violation of Watson's rights under the *Fifth* and *Fourteenth* Amendments of the United States Constitution. . . . ") (emphasis added).

Watson has not submitted evidence sufficient to create a triable issue of material fact as to whether preparing and completing the arrest report was a general job requirement imposed on all Riverside deputy sheriffs, *c.f. California v. Byers*, 402 U.S. 424, 429-31, 91 S. Ct. 1535, 1538-39 (1971) ("[t]here is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement"), and thus the Court concludes from the unchallenged evidence that requiring Watson to prepare and complete the report, despite the heavy handed circumstances of the incident, did not compel Watson to incriminate himself in violation of the Fifth Amendment. *Cf. United States v. Indorato*, 628 F.2d 711 (1st Cir. 1980) (informal questioning of officer by superior was not sufficiently coercive to implicate Fifth Amendment, despite defendant's fear that he would be terminated for failing to answer questions) (collecting and discussing cases).

Watson's heavy reliance on *Cooper v. Dupnick*, 963 F.2d 1220 (9th Cir. 1992) (en banc) thus misses the point. In *Cooper*, the plaintiff was unconstitutionally interrogated by various officer defendants, but he was never charged with any crime. The issue, as relevant here, was whether he could bring a section 1983 claim for deprivation of his Fifth Amendment rights where the statements extracted from him during interrogation were never used against him at trial or otherwise. The Ninth Circuit held that the plaintiff was potentially deprived of his Fifth Amendment rights at the time of the unlawful interrogation itself. The issue here, however, is not when the alleged compulsion of Watson ripened into a full blown constitutional violation. Rather, the issue is whether his commanding officer's requirement that Watson, a subordinate peace

officer complete a required arrest report constitutes compulsion depriving Watson of his Fifth Amendment right to not incriminate himself. The Court concludes, based on the uncontroverted admissible evidence, that a reasonable trier of fact could not find from that evidence that such compulsion was inflicted on Watson by the defendants.

Finally, *Commonwealth v. Gallati*, 661 N.E.2d 948 (Mass. Ct. App. 1996) also provides no support to Watson's section 1983 claim for deprivation of his Fifth Amendment rights. In that case, a peace officer suspected of wrongdoing faced "formal, domineering and relentless" questioning by an unfamiliar supervisor. It is factually undisputed that Watson was not subjected to such questioning by any of the individual defendant officers.

b. Fourteenth Amendment – Procedural Due Process

Watson alleges that he was deprived of his Fourteenth Amendment right to procedural due process when his attorney was ejected by Fredendall from his presence immediately prior to his writing his report. Defendants contend that there was no violation of Watson's procedural due process rights because there was no right to representation prior to the completion of his report and that even if there were such a right, Watson never adequately invoked it. In addition, defendants argue that any such right was fully vindicated when Watson was afforded the opportunity to meet with counsel prior to submitting his report to the officer defendants who were his supervisors and superiors.

To prevail on his procedural due process claim, Watson must first establish that he faced deprivation of a protected liberty or property interest. *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705 (1972). As a permanent employee of the Riverside Sheriffs' Department, Watson had such a property interest in his job.[2] *See Barberic v. City of Hawthorne*, 669 F. Supp. 985, 989-90 (C.D. Cal. 1987). Once such an interest is established, the Court must apply a three-factor balancing test to determine what process is due. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03 (1976). Under *Matthews* [sic], the Court must consider (1) the private interest at stake, (2) the risk of an erroneous deprivation of the interest under the procedures used and the likely benefit of other or additional procedures, and (3) the Government's interest, including the burdens that additional or substitute procedural requirement would entail. *Id.*

I. Private Interest affected

As a nonprobationary deputy sheriff, Watson had a substantial interest in his state employment. *See Nunez v. City of Los Angeles*, 147 F.3d 867, 871-72 (9th Cir. 1998) ("[O]ne's actual job as a tenured civil servant is property.") (citing *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985)); *Barberic*, 669 F. Supp. at 989-90.

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[2] Because the Court concludes that Watson has a constitutionally protected property interest in his public employment, the Court does not consider at this point any other protected interests, including liberty interests, of Watson that may have been affected by the actions of defendants.

II. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards

Watson has submitted uncontested evidence that in officer-involved shooting incidents, deputy sheriffs such as Watson are permitted to consult with their counsel before writing any report. This policy, in the Court's view, significantly reflects the County's own determination that consultation with counsel serves a valuable function in the investigation of a major personnel incident such as an officer involved shooting.

As to this second element of procedural due process required under the circumstances there are genuine issues of material fact which prevent resolution of the issue at this point. They are: 1) was the use of force incident in which Watson was involved on April 1, 1996 of such unique concern to his superiors, as well as to other law enforcement agencies, that it was a major personnel incident; 2) to what degree was Watson distraught, upset or incoherent while drafting the report; 3) was he then aware that possible criminal prosecution and employment disciplinary action against him were either being contemplated, or underway, regarding the incident, 4) did the conduct of Fredendall, including isolating Watson, expelling Cote, removing the phone and repeatedly interrupting Watson's work, heighten Watson's anxiety; 5) was Watson, under the circumstances, capable of evaluating and managing the potential impact his writing the arrest report could have on his County employment; 6) if counsel were allowed to remain with Watson, could and would she have advised Watson of the option of refusing to write the

report, as well as the likely consequences of such refusal, and could she or would she have discussed with Watson the possible use of the report against him at any employment related disciplinary proceedings; 7) could or would Watson and his attorney Cote have discussed the option of documenting the use of force in a separate memorandum, perhaps at a later time, as seems to have been Watson's right under County policy; 8) could and would counsel have advised Watson concerning the required or advisable scope of any report Watson did choose to write; 9) could and would counsel have explained to Watson the possible impact on his Fifth Amendment right not to testify at trial of choosing to write the report; 10) did the expulsion of Watson's attorney from his presence effect Watson's emotional state or his ability to exercise his best judgment; 11) was any such effect exacerbated by defendants hurrying Watson along and repeatedly interrupting his preparation of the report, and 12) did defendants act of allowing Watson's counsel and union representative to review the completed report with him before its submission to his superiors provide any significant procedural protection against these various risks, or were the circumstances such that this review meeting provided no meaningful opportunity for him to alter, revise or choose not to submit the report?

In summary, there are a number of genuine issues of fact regarding the degree to which Watson's constitutionally protected property interest in his state employment was at risk throughout this report writing incident, and whether or to what extent the assistance of counsel as a procedural safeguard to Watson in dealing with Fredendall's report-writing command would have substantially

lessened the risk of an erroneous deprivation of this interest.

III. The Government's Interest

As to the final *Matthews* [sic] factor, this Court determined in the preliminary injunction order that the Government's interest in obtaining complete and accurate police reports would not have been particularly burdened by allowing Watson to consult with counsel before writing his report. Particularly on the facts of this case, where all Watson requested was that his *already present* attorney be allowed to consult with him during or prior to the preparation of his report, the burden on the government seems low. Moreover, the undisputed fact that the County's shooting incident policy allows consultation with counsel suggests that such allowance would not be overly burdensome.

Defendants' "floodgates" argument is unconvincing. The Court is not suggesting that the Fourteenth Amendment requires that any officer be allowed to consult with an attorney before writing any incident report. But where an officer is ordered to compose a report concerning arguably severe misconduct, where the misconduct at issue has received extensive media attention, and where it is virtually certain that disciplinary and criminal investigations are underway or soon to commence, the Fourteenth Amendment may well require the officer be allowed to consult with his already present attorney. Defendants motion for summary judgment will be denied as to the section 1983 claim for deprivation of Watson's Fourteenth

Amendment right to procedural due process and his request for injunctive relief.[3]

C. Watson's Section 3303 Claims

Watson contends that his section 3303 rights were violated by the defendants' order that he write the arrest report. The order, he argues, was the functional equivalent of an "interrogation" which was conducted without application of that section of the California Government Code's various procedural protections. Defendants contend that there was no interrogation and thus the section did not apply. The Court agrees with defendants.

Section 3303(i) applies only where a "public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department. . . . " Cal. Govt. Code § 3303(i). Although the term "interrogation" is not defined in the statute, the Court does not believe it can be interpreted to include Fredendall's command that Watson write an arrest report. In the Court's view, at least some interactive communication must occur for a workplace encounter to be deemed an interrogation within the meaning of the statute. This interaction need not necessarily take the form of express questioning, but must, at a minimum, include statements that the "interrogating" officer should know are reasonably likely to elicit an

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[3] Defendants also argue that Watson failed to make clear his desire to consult with counsel because neither Watson nor Cote protested her expulsion with sufficient vigor. The Court rejects the argument which, at best, presents a factual dispute.

incriminating response. *Cf. Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682 (1980) (employing this definition of "interrogation" in the *Miranda* context). Here, Fredendall made no such statements to Watson, but simply ordered Watson to perform a job responsibility. There was no interrogation.

City of Los Angeles v. Superior Court (Labio), 67 Cal.Rptr.2d 775 (Ct. App. 1997), relied on by plaintiff, is thus completely unlike the present case. The commanding officer in *Labio* directly questioned officer Labio regarding Labio's suspect conduct. That questioning constituted interrogation, and thus the Court was required to determine if the proper statutory procedures were followed by the questioning officer or if the statute's exemption for "routine contact" applied. These issued need not be reached where there was no interrogation. Defendants' motion for summary judgment will be granted on the section 3303 claim.

D. Watson's California Constitution, Article I §§ 1-3, 7, and 13 Claims

Defendants contend that there were no violations of any state constitutional rights. Watson does not address the alleged state constitutional violations in his opposition to the motion for summary judgment and the Court finds that he has abandoned the claim.[4] Watson's novel state

[4] *See also Plaintiff's Supplemental Memorandum in Opposition to Summary Judgment Motion Regarding Newly Announced Case On Point* at 1 ("This action seeks an appropriate remedy for the violation of Watson's rights under the *Fifth* and *Fourteenth* Amendments of the United States Constitution. . . . ") (emphasis added).

constitutional claims are inadequately briefed to survive defendants' (admittedly similarly cursory) motion for summary judgment.

IV.

DISPOSITION

THEREFORE, IT IS ORDERED THAT:

1. Defendants' motion for summary judgment is denied as to the first claim against the individually named defendants in their official capacities insofar as the claim is based on those defendants' deprivation of plaintiff's Fourteenth Amendment right to procedural due process and seeks injunctive relief. Otherwise defendants' motion for summary judgment is granted as to this claim.

2. Defendants' motion for summary judgment is granted as to the second claim.

3. Defendants' motion for summary judgment is granted as to the third claim.

Date: 3/9/99

/s/ Robert J. Timlin
ROBERT J. TIMLIN,
DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRACY L. WATSON, Plaintiff-Appellee, v. COUNTY OF RIVERSIDE, Defendant-Appellant, and LARRY D. SMITH, et al., Defendants.	No. 01-56214 D.C. No. CV-96-00148-RT Central District of California, Riverside ORDER (Filed Oct. 9, 2002)

TRACY L. WATSON, Plaintiff-Appellant, v. COUNTY OF RIVERSIDE, et al., Defendant-Appellees,	No. 01-56298 D.C. No. CV-96-00148-RT-04 Central District of California, Riverside

Before: HALL, SILVERMAN and RAWLINSON, Circuit Judges.

Judges Silverman and Rawlinson have voted to reject the petition for rehearing en banc and Judge Hall so recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

APPENDIX E

42 U.S.C. § 1983

(a) Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district and circuit courts [district courts] by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs,

except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees. In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes [42 USCS §§ 1981 or 1981a], the court, in its discretion, may include expert fees as part of the attorney's fee.